University of Baltimore Law Review

Volume 38
Issue 1 *Fall 2008*

Article 5

2008

# Plains Commerce Bank's Potential Collision with the Expansion of Tribal Court Jurisdiction by Senate Bill 3320

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# *PLAINS COMMERCE BANK*'S POTENTIAL COLLISION WITH THE EXPANSION OF TRIBAL COURT JURISDICTION BY SENATE BILL 3320

**The Honorable Patience Drake Roggensack†**

On June 25, 2008, the U.S. Supreme Court decided *Plains Commerce Bank v. Long Family Land & Cattle Co.*,[1] in which it reaffirmed that civil tribal court subject matter jurisdiction is extremely limited when a claim against a non-tribal member is brought in a tribal court.[2] On July 23, 2008, Senate Bill 3320 was introduced as the "Tribal Law and Order Act of 2008." A part of the bill seeks to expand the scope of the criminal jurisdiction of tribal courts to include jurisdiction over non-tribal defendants.[3]

This article examines *Plains Commerce Bank*, as it explains in detail the very limited nature of tribal court subject matter jurisdiction over a claim made against a non-tribal member defendant and grounds that limitation of tribal court jurisdiction in the U.S. Constitution. The article then examines the potential guidance that *Plains Commerce Bank* offers to Congress as Congress considers Senate Bill 3320, with its expansion of subject matter jurisdiction of criminal matters to include non-tribal member defendants.

## I. *PLAINS COMMERCE BANK*

*Plains Commerce Bank* is the U.S. Supreme Court's most recent examination of civil subject matter jurisdiction of tribal courts when a

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1. Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709 (2008).
2. *Id.* at 2718–19.
3. Tribal Law and Order Act, S. 3320, 110th Cong. §§ 1, 401 (2008).

claim is made against a non-tribal member. In *Plains Commerce Bank*, members of the Cheyenne River Sioux Tribe, the Longs[4] and their ranching and farming corporation (hereinafter collectively referred to as "the Longs"), sued a non-tribal member, Plains Commerce Bank (the Bank), in the Cheyenne River Sioux tribal court.[5] The Longs, who had been customers of the Bank for many years, alleged that the Bank discriminated against them contrary to tribal law when the Bank sold non-tribal members land in which the Bank held a fee interest.[6] Although recognizing that suits against non-tribal members are not permitted in tribal courts unless they fit within one of the two exceptions set out in *Montana v. United States*,[7] the Longs alleged that the land sales had arisen directly from their preexisting commercial relationship with the Bank, and accordingly, the sales fell within the first exception to the general rule that tribes lack civil jurisdiction over non-tribal members.[8]

In *Montana*, the Supreme Court described two narrow circumstances in which a tribal court has potential jurisdiction over a claim against a non-tribal member defendant in a civil suit.[9] First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[10] Second, "[a] tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[11]

In *Plains Commerce Bank*, the Bank contended that the tribal court did not have subject matter jurisdiction to adjudicate the Longs' discrimination claim.[12] The tribal court disagreed.[13] It concluded that it

4. *Plains Commerce Bank*, 128 S. Ct. at 2715. The Longs are enrolled members of the Cheyenne River Sioux Indian Tribe. *Id.*
5. *Id.*
6. *Id.* at 2714. Fee land differs from trust land in that fee land is "fully alienable" and free of tribal jurisdiction over its sale. *Id.* at 2719.
7. 450 U.S. 544 (1981). The two exceptions to the general prohibition against tribal courts exercising civil jurisdiction over non-tribal members described in *Montana* will be referred to in this article as the "*Montana* exceptions."
8. *Plains Commerce Bank*, 128 S. Ct. at 2720.
9. *Montana*, 450 U.S. at 565–66.
10. *Id.* at 565.
11. *Id.* at 566.
12. *Plains Commerce Bank*, 128 S. Ct. at 2715–16.
13. *Id.* at 2716.

had jurisdiction and the case proceeded to trial.[14] A tribal jury found that the Bank had discriminated against the Longs in its sales of land, and it awarded the Longs $750,000 in damages.[15] The tribal court later supplemented the money judgment by awarding the Longs an option to purchase 960 acres of the fee land that the Bank once owned.[16] The tribal court's supplementation of the jury verdict "effectively nullifi[ed] the Bank's previous sale of that land to non-Indians."[17]

The Bank appealed to the Cheyenne River Sioux Tribal Court of Appeals, which affirmed the tribal court, thereby exhausting the Bank's tribal court remedies.[18] The Bank then brought a declaratory judgment action in federal court, asserting that the judgment was void because the tribal court lacked subject matter jurisdiction to adjudicate the discrimination claim against it.[19] The Supreme Court agreed with the Bank.[20]

The Court began by explaining that "whether a tribal court has adjudicative authority over nonmembers is a federal question."[21] Therefore, whether jurisdiction exists over a claim against a non-tribal member defendant is not a matter of tribal law, or a matter of state law. The Court acknowledged that Indian tribes are "distinct, independent political communities"[22] and that they are "qualified to exercise many of the powers and prerogatives of self-government."[23] However, the Court pointed out that in regard to the attributes of sovereignty that the tribes retain, "many" is definitely not "all."[24] The Court noted that it has long held that the "sovereignty that the Indian

14. *Id.* The Court did not relate the reasoning of the tribal court that caused it to conclude that it had subject matter jurisdiction over the claim against the Bank. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* At times, federal courts have required those who seek relief from the civil claims filed in tribal courts to exhaust tribal remedies before proceeding in federal court. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985). *But cf,* El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 483 (1999) (holding the tribal exhaustion doctrine does not apply and the lower courts should not have abstained from answering the question presented).
19. *Plains Commerce Bank*, 128 S. Ct. at 2716.
20. *Id.* at 2714.
21. *Id.* at 2716–17 (citing *Iowa Mut.*, 480 U.S. at 15; *Nat'l Farmers Union*, 471 U.S. at 852–53).
22. *Id.* at 2718 (citing Worcester v. Georgia, 6 Pet. 515, 559 (1832)).
23. *Id.* (citing United States v. Wheeler, 435 U.S. 313, 322–23 (1978)).
24. *Id.*

tribes retain is of a unique and limited character."[25] Tribal sovereignty is limited to tribal reservation land and to tribal members within the reservation.[26] The Court noted that "tribes retain authority to govern 'both their members and their territory,' subject ultimately to [the will of] Congress."[27] Therefore, because the scope of tribal sovereignty is limited, a tribe's adjudicatory powers, which arise from tribal sovereignty, are limited as well.

As examples of appropriate exercises of tribal sovereignty, the Court cited tribal taxation of activities taking place on a reservation,[28] tribal regulation of domestic relations among tribal members,[29] and tribal exclusion of non-tribal members from tribal lands.[30] However, the Court was very strong in its declaration that, as a general rule, tribes do not have adjudicative authority over claims against non-Indians, even when non-tribal members come within the borders of a tribal reservation.[31] The Court explained that the tribes have lost "'the right of governing . . . person[s] within their limits except themselves,'" by virtue of the tribes' incorporation into the American republic.[32] The Court also pointed out that the nature of tribal court jurisdiction over claims against a non-tribal member defendant is ex-extremely limited when the subject of the dispute is land owned in fee by the defendant, as was the land sold by Plains Commerce Bank.[33]

The Court set out *Montana*'s two limited exceptions to the general rule that tribal courts have no jurisdiction over claims against non-tribal members by quoting portions of *Montana* and then explaining what those exceptions actually entailed.[34] The Court said that a "'tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'"[35] The Court also said that a "tribe may exercise 'civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct

25. *Id.* (quoting *Wheeler*, 435 U.S. at 323).
26. *Id.* (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).
27. *Id.* (quoting *Mazurie*, 419 U.S. at 557).
28. *Id.* (citing Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 201 (1985).
29. *Id.* (citing Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont., 424 U.S. 382, 387–89 (1976) (per curiam)).
30. *Id.* (citing Duro v. Reina, 495 U.S. 676, 696–97 (1990)).
31. *Id.* at 2718–19 (citing Montana v. United States, 450 U.S. 544, 565 (1981)).
32. *Id.* at 2719 (quoting Oliphant v. Suquamish Tribe, 435 U.S. 191, 209 (1978)).
33. *See id.* at 2720.
34. *Id.*
35. *Id.* (quoting *Montana*, 450 U.S. at 565).

effect on the political integrity, the economic security, or the health or welfare of the tribe.'"[36] In its explanation, the Court carefully cabined the two exceptions to prevent them from being interpreted broadly.[37]

For example, because of the limited nature of the sovereignty that the tribes retain and because subject matter jurisdiction is grounded in tribal sovereignty, the Court related that the analysis of a tribal court's exercise of civil subject matter jurisdiction over a claim against a defendant who is a non-tribal member begins with the presumption that an attempted exercise is *not valid*.[38] This is a critical factor in apprising tribal court jurisdiction when a tribal member seeks to bring a non-tribal member before a tribal court because the tribal member must prove that the defendant's conduct fits within one of the two *Montana* exceptions or there is no tribal court jurisdiction to adjudicate the claim. After setting this framework for its analysis, the Court began by examining the Longs' suit against the Bank under *Montana*'s first exception to the general rule that tribal courts have no subject matter jurisdiction over claims against non-tribal members.[39]

The Court quoted its earlier opinion in *Strate v. A-1 Contractors*,[40] wherein the Court held that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[41] The Court reasoned that because a tribe could not legislate to set the terms or conditions under which a non-tribal member could sell its fee land, the Cheyenne River Sioux Indian Tribe had no subject matter jurisdiction to hear the Longs' claim that the sale of the Bank's land discriminated against the Longs.[42] The principle that if a tribe cannot legislate to govern the persons and conduct at issue, it cannot adjudicate claims arising out of that conduct, was important to the Court's explanation that the *Montana* exceptions are very narrow. Tying the scope of a tribe's subject matter jurisdiction to the scope of its legislative power is a very limiting concept of tribal court subject matter jurisdiction when

36. *Id.* (quoting *Montana*, 450 U.S. at 566).
37. *Id.* at 2719–20.
38. *Id.* at 2720 (citing Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001)).
39. *Id.* at 2720–21.
40. 520 U.S. 438 (1997).
41. *Id.* at 453. In *Plains Commerce Bank*, there was no contention that the Cheyenne River Sioux Indian Tribe had the sovereign right to set the terms and conditions under which the Bank could sell the land that it held in fee. 128 S. Ct. 2709.
42. *Plains Commerce Bank*, 128 S. Ct. at 2720.

a tribe's legislative power is limited, as is the case in regard to fee land within a reservation.[43]

The Court also said that *Montana*'s exceptions to the general rule that tribal courts have no jurisdiction over claims against non-tribal members may be applied only to "*conduct* inside the reservation that implicates the tribe's sovereign interests."[44] The Court explained that in *Montana*, it had expressly limited the first exception to the "'activities of nonmembers,' . . . necessary 'to protect tribal self-government [and] to control internal relations.'"[45] In response to the separate opinion of Justice Ginsburg, who questioned the majority opinion's reliance on "conduct" within a reservation as a necessary condition to the invocation of a *Montana* exception, the Court explained that "[t]he distinction between [a] sale of the land and conduct on it is well-established in our precedent . . . and [is] entirely logical given the limited nature of tribal sovereignty and the liberty interests of nonmembers."[46] The Bank had sold fee land.[47] Therefore, the land itself was not reservation land, and the tribe had no authority to regulate the terms or conditions of the sale of that land.[48] Accordingly, tribal court subject matter jurisdiction over the tribe's discrimination claim against the Bank did not exist under the first *Montana* exception.[49]

In regard to the second *Montana* exception that may apply to "non-Indians' 'conduct' [that] menaces the 'political integrity, the economic security, or the health or welfare of the tribe,'"[50] the Court noted that one commentator concluded that such conduct could be regulated by a tribe in the exercise of its sovereignty only if such exercise of tribal power was "'necessary to avert *catastrophic consequences*.'"[51] The Court concluded that the sale of fee land would not have a "catastrophic" effect on the tribe and therefore, the sale formed no basis for the exercise of tribal court jurisdiction over a claim against a non-

43. Other commentators have also observed that the concept that the judicial powers of a tribe are coextensive with its legislative powers is "profoundly limiting" of tribal court jurisdiction. Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 569–70 (1997).

44. *Plains Commerce Bank*, 128 S. Ct. at 2721 (emphasis in original).

45. *Id.* (quoting Montana v. United States, 450 U.S. 544, 564–65 (1981)).

46. *Id.* at 2723.

47. *Id.* at 2715.

48. *See id.* at 2719.

49. *See id.*

50. *Id.* at 2726 (quoting *Montana*, 450 U.S. at 566).

51. *Id.* (emphasis added) (citation omitted).

tribal member defendant under *Montana*'s second exception.[52] Requiring that a non-tribal defendant's conduct have a catastrophic effect on the tribe before a tribe could regulate that conduct under *Montana*'s second exception placed a very strict limit on tribal use of the second *Montana* exception.

However, notwithstanding the Court's careful analysis of *Montana*'s exceptions, the central concern that drives the Court's decision in *Plains Commerce Bank* is the Court's discussion of the rights secured by the U.S. Constitution that are available to a defendant in federal court, but are not available in tribal court. Stated otherwise, the unavailability of those constitutional rights that a defendant has in federal court, but not in tribal courts, was the lens through which the Court examined the Longs' and the Bank's contentions relative to subject matter jurisdiction.

In this regard, the Court first voiced its concern about a litigant's constitutional rights in response to Justice Ginsburg's query about the majority opinion's requirement of non-tribal member conduct on tribal land as a precondition to jurisdiction. The Court explained that conduct by a non-tribal member that occurs on tribal land is necessary to invoke a *Montana* exception because tribal sovereignty is of such a limited nature.[53] The Court also noted that because "the liberty interests of nonmembers" are at issue when considering the scope of subject matter jurisdiction of a tribal court over a claim against a non-tribal member, non-tribal member conduct that occurs on tribal land is necessary before a tribe's sovereign interest is affected, which has the potential to support jurisdiction.[54] Furthermore, while such conduct is necessary for subject matter jurisdiction, it may not be sufficient to support jurisdiction in all cases.[55] That is, not all conduct by a non-tribal defendant that occurs on tribal land will be sufficient to support subject matter jurisdiction over the controversy.[56] The conduct must also fit within one of *Montana*'s two exceptions.[57]

The Court later amplified its concern for the constitutional rights of a non-tribal member defendant in greater detail when it explained that broadly interpreting *Montana*'s exceptions would impinge on individual rights in defined ways.[58] For example, the Court explained

52. *Id.*
53. *Id.*
54. *Id.* at 2722–23.
55. *Id.* at 2726.
56. *Id.*
57. *Id.* at 2719–20.
58. *Id.* at 2724.

that permitting tribal courts to exercise jurisdiction would "run[] the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent."[59] The Court noted that non-tribal members

> have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented [to tribal court jurisdiction] either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.[60]

The Court also reaffirmed that tribal sovereignty is "'outside the basic structure of the Constitution.'"[61] Most significantly, the Court pointed out that "[t]he Bill of Rights does not apply to Indian tribes."[62]

With the Court's concerns about the inapplicability of the U.S. Constitution to proceedings in tribal courts and the effect that this has on non-tribal member defendants in tribal courts during a civil suit, I now turn to the proposed expansion of criminal jurisdiction in tribal courts that is presently pending in Congress as Senate Bill 3320. If enacted into law, the bill would permit criminal subject matter jurisdiction in tribal courts over non-tribal member defendants.

## II. SENATE BILL 3320

On July 23, 2008, Senate Bill 3320 was introduced to amend the Indian Law Enforcement Reform Act, the Indian Tribal Justice Act, the Indian Tribal Justice Technical and Legal Assistance Act of 2000, and the Omnibus Crime Control and Safe Streets Act of 1968. The short title for the bill, should it become law, will be the "Tribal Law and Order Act of 2008."[63]

The avowed purpose of the bill was "to improve the prosecution of, and response to, crimes in Indian country, and for other purposes."[64] One of the stated purposes of the bill is to reduce crime on Indian reservations, which is represented in the bill to be of epic propor-

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59. *Id.*
60. *Id.* (citing Montana v. United States, 450 U.S. 544, 564 (1981)).
61. *Id.* (quoting United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring)).
62. *Id.* (citing Talton v. Mayes, 163 U.S. 376, 382–85 (1896)).
63. S. 3320, 110th Cong. § 1(a) (2008).
64. *Id.* pmbl.

tions.[65] The bill contains several provisions to further the goal of crime reduction on tribal reservations. It provides for hiring more law enforcement officers at federal expense to work on tribal land,[66] for constructing tribal prisons at federal expense to incarcerate those convicted of crimes by tribal courts,[67] and for expanding the criminal jurisdiction and sentencing authority of tribal courts.[68]

A tribal court has criminal jurisdiction over its own tribal members and also over members of other American Indian tribes for conduct that occurs on tribal land.[69] A tribal court's criminal jurisdiction over members of American Indian tribes can result in incarceration of no more than one year or a $5,000 fine.[70] Senate Bill 3320 expands potential incarceration to three years and raises the maximum fine to $15,000.[71] Currently, tribal courts have no criminal jurisdiction over non-Indian citizens.[72] The bill's expansion of criminal jurisdiction in tribal courts to include criminal jurisdiction over non-Indian citizens is the area of my concern.

Although tribes do retain the general authority to govern their members while on tribal land, Congress has plenary power to limit that authority.[73] Furthermore, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation" of authority to the tribes.[74]

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65. *Id.* § 2; *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 203097, AMERICAN INDIANS AND CRIME (2004) (a statistical profile highlighting the disturbing crime rates affecting American Indians).
66. S. 3320, § 305(c)(1).
67. *Id.* § 404(b).
68. *See id.* § 201 (stating the proposed changes to allow tribal courts to maintain concurrent jurisdiction with the federal government over crimes committed on Indian land).
69. *See* United States v. Lara, 541 U.S. 193, 200 (2004).
70. 25 U.S.C. § 1302 (2006) ("No Indian tribe in exercising powers of self-government shall . . . (7) . . . impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year [or] a fine of $5,000, or both . . . .").
71. S. 3320, § 304(3).
72. United States v. Wheeler, 435 U.S. 313, 326 (1978) (explaining that a tribe's lack of power to try a nonmember rests on the dependent status of Indian tribes within the territorial jurisdiction of the United States); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (concluding that by "submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily [gave] up their power to try non-Indian citizens of the United States . . . .").
73. Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2718 (2008) (citing United States v. Mazurie, 419 U.S. 544, 557 (1975)).
74. Montana v. United States, 450 U.S. 544, 564 (1981).

Federal courts have concurrent jurisdiction with tribal courts to prosecute crimes committed on tribal land by tribal members.[75] If a tribal court convicts a tribal member of committing a crime, prosecution in federal court for the same act that resulted in a conviction by a tribal court does not invoke double jeopardy concerns due to the separate sovereigns doctrine.[76] Accordingly, under current federal law, a tribal member could be convicted of armed robbery and receive a one-year sentence in tribal court and also be prosecuted and convicted in federal court, and receive a significantly longer sentence.

At the present time, Congress has not granted tribal courts criminal subject matter jurisdiction over non-tribal members.[77] Crimes committed by non-tribal members on tribal land must be prosecuted in federal court,[78] unless the tribal land is located in a Public Law 280 state.[79] In Public Law 280 states, state courts have subject matter jurisdiction over crimes committed by all persons on tribal land.[80] Absent Public Law 280 status, a crime committed by a non-tribal member against either an Indian or another non-tribal member on an Indian reservation is subject to exclusive federal jurisdiction.[81]

There is good reason for the limits on the criminal jurisdiction of tribal courts. First, it has long been the rule that the Bill of Rights

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75. *See* United States v. Lara, 541 U.S. 193, 198 (2004); *see also* 25 U.S.C. § 1301(2) (granting tribal courts power to exercise criminal jurisdiction over all Indians); 18 U.S.C. § 1153(a) (2006) (establishing as federal crimes fifteen major crimes committed by an Indian on an Indian reservation); 18 U.S.C. § 3242 (providing that Indians who are charged with an offense under § 1153(a) "shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States"); 18 U.S.C. § 1152 (conferring on federal courts criminal jurisdiction over criminal offenses committed within Indian country).

76. *Lara*, 541 U.S. at 210 (concluding that Lara's prosecution in both tribal court and in federal court for the assault of a federal officer on tribal land did not raise double jeopardy concerns).

77. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853–54 (1985) (reaffirming that the federal law that "confer[s] jurisdiction on the federal courts to try non-Indians for offenses committed [on reservation land] implicitly pre-empt[s] tribal jurisdiction"); *Oliphant*, 435 U.S. at 204 (concluding that as between tribal courts and federal courts, Congress has reserved criminal jurisdiction over non-Indians to the federal courts).

78. 18 U.S.C. § 1152.

79. *Id.* § 1162.

80. *Id.* Public Law 280 provides for concurrent state court jurisdiction over crimes committed and civil causes of action arising on tribal land. *Id.*; 28 U.S.C. § 1360 (2000).

81. 18 U.S.C. § 1152. However, due to an act of Congress, tribal court criminal jurisdiction does include jurisdiction over other Indians who may not be a member of the prosecuting Indian tribe. *Lara*, 541 U.S. at 197–98.

does not constrain Indian tribes and their courts.[82] As early as 1896, in *Talton v. Mayes*, the Supreme Court explained that because tribal sovereignty predates the Constitution, tribal courts are not required to apply the Bill of Rights of the U.S. Constitution.[83] One could argue that because *Talton* is such an old case, it may no longer be good law. However, the Supreme Court affirmed *Talton* in *Plains Commerce Bank*, decided in June of 2008.[84] Therefore, it remains the law that tribal courts are not required to adhere to the restrictions on governmental actions that the Bill of Rights of the U.S. Constitution mandates for state and federal courts.[85]

The absence of the Bill of Rights from tribal courts is also a disadvantage for tribal members that has been recognized by Congress.[86] Therefore, because of concerns that have been raised about the lack of civil rights available to tribal members who were brought before tribal courts as criminal defendants, Congress passed the Indian Civil Rights Act of 1968.[87] However, the Indian Civil Rights Act does not provide all of the personal rights that are found in the Bill of Rights, but instead provides as follows:

> No Indian tribe in exercising powers of self-government shall—
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
> (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure[], nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
> (3) subject any person for the same offense to be twice put in jeopardy;
> (4) compel any person in any criminal case to be a witness against himself;

82. *Plains Commerce Bank*, 128 S. Ct. at 2724 (citing Talton v. Mayes, 163 U.S. 376, 382–85 (1896)).
83. *Talton*, 163 U.S. at 382–85.
84. *Plains Commerce Bank*, 128 S. Ct. at 2724.
85. *See id.*
86. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62 (1978).
87. 25 U.S.C. § 1302 (2000).

> (5) take any private property for a public use without just compensation;
> (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year [or] a fine of $5,000, or both;
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
> (9) pass any bill of attainder or ex post facto law; or
> (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.[88]

An analysis of the Indian Civil Rights Act of 1968 is beyond the scope of this article. However, even a cursory review shows that it does not provide the same rights as does the U.S. Constitution. For example, assistance of counsel to a defendant in a criminal proceeding is required under the Indian Civil Rights Act only at a defendant's "own expense."[89]

Furthermore, the Indian Civil Rights Act has no "establishment clause" in regard to religion, as is provided in the First Amendment.[90] As a result of the lack of an establishment clause in the Indian Civil Rights Act, tribal courts are not required to separate religion, or "tradition" as it is often called, from the exercise of tribal authority in tribal court.[91] As tribal Judge Roman J. Duran, the first Vice President of the National American Indian Court Judges Association, explained in his testimony before the Senate Committee on Indian Affairs, "each tribe to a certain degree operates on a theocratic form of government; such that there is no separation of 'Church' and 'State',

88. *Id.*
89. *Id.*
90. In regard to religious freedoms, the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.
91. *See Santa Clara Pueblo*, 436 U.S. at 63.

whereby custom and tradition is the choice of law on a consistent and daily basis."[92] It is beyond dispute that a central tenet of the First Amendment of the U.S. Constitution is the prohibition of state establishment of religion.

Second, non-tribal members have no say in tribal governance. They have not chosen to give up any of the constitutional protections accorded to a defendant in a criminal proceeding in federal or state court when they are hauled into tribal court.

Third, there is no power of review of tribal court decisions by way of the usual federal structure for review of criminal convictions. To have the conviction of a crime in tribal court reviewed, a defendant must commence a separate federal court action. This is generally done by way of a habeas petition.[93] As Justice Kennedy recognized, "[t]he political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights."[94]

If Senate Bill 3320 becomes law, non-tribal member defendants may be forced to proceed in tribal court without the constitutional rights provided to criminal defendants by the United States Constitution or in Public Law 280 states, rights provided by the state constitution where the tribal land is located. I am not persuaded that increasing the criminal subject matter jurisdiction of tribal courts will reduce the number or types of crimes committed on tribal lands. However, even if I were to accept that it may do so, can any law, federal, state or tribal, be permitted to reduce the constitutional guarantees to which all are entitled?

## III. CONCLUSION

Congress should deliberate carefully on Senate Bill 3320. While crime on tribal land is a real problem that must be addressed, increasing the subject matter jurisdiction of tribal courts has the potential to

92. *Tribal Law and Order Act of 2008: Hearing Before the S. Comm. on Indian Affairs*, 1-2 (July 24, 2008) (statement of Roman J. Duran, Vice President, National American Indian Court Judges Association).

93. 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."); *see, e.g.*, Duro v. Reina, 495 U.S. 676, 709 (1990); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69–70 (1978); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 885–87 (2d Cir. 1996); Wetsit v. Stafne, 44 F.3d 823, 824–26 (9th Cir. 1995); Smith v. Confederated Tribes of Warm Springs Reservation of Or., 783 F.2d 1409, 1410 (9th Cir. 1986).

94. United States v. Lara, 541 U.S. 193, 214 (2004) (Kennedy, J., concurring).

create additional problems of constitutional dimension. Therefore, even though *Plains Commerce Bank* involves the examination of subject matter jurisdiction in a civil law context, it provides a well-reasoned framework for significant constitutional concerns. Consideration of *Plains Commerce Bank* will aid the examination of Senate Bill 3320's proposed changes in the subject matter jurisdiction of tribal courts in criminal cases. It should not be overlooked in Congress' deliberative process.